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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 740

ACHILLES ABBAMONTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1965

ACHILLES ABBAMONTE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above-entitled case on the 16th day of July, 1965, which affirmed a judgment of conviction of the United States District Court for the Southern District of New York.

The Opinion Below

The ~~per curiam~~ opinion of the Circuit Court of Appeals in this case has not yet been reported, but is set forth in Appendix A, *infra*, page 13.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 16th day of July, 1965 (Appendix B, *infra*, page 23). Rehearing was denied on September 15, 1965

(Appendix C, *infra*, pages 24 and 25). By order of Honorable John M. Harlan, Associate Justice of this Court, dated October 12, 1965, the time for the filing of this petition for writ of certiorari was extended to and including the 13th day of November, 1965.

Jurisdiction of this Court is invoked under 28 USC, Sec. 1254 (1).

Questions Presented

(1) Whether the Circuit Court of Appeals erred in sanctioning the improper and unauthorized assignment of counsel?

(2) Whether the Circuit Court of Appeals erred in attempting to justify the unauthorized assignment of counsel by his performance during trial?

(3) Whether the Circuit Court of Appeals erred in sanctioning the wrongful denial of Petitioner's right to the selection and assistance of counsel of his own free choice?

(4) Whether the Circuit Court of Appeals erred in sanctioning the finding that the Petitioner failed to justify the discharge of his retained counsel?

(5) Whether the Circuit Court of Appeals erred in sanctioning the disregard of the Petitioner's express statement of readiness?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides inter alia:

> "No person shall * * * be deprived of life, liberty or property, without due process of law."

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

Rule 44, Federal Rules of Criminal Procedure provides:

> "Assignment of Counsel. If the Defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding *unless he elects to proceed without counsel or is able to obtain counsel.*" (Italics supplied.)

Statement of the Case

The Petitioner was charged with a single sale of narcotic drugs in violation of Title 21 United States Code 173, 174.

On August 10, 1964, the day of trial and prior to the selection of a jury, the Petitioner discharged his retained counsel (10a) and stated that he was then and there ready to proceed to immediate trial (11a) but without the services of his discharged attorney. The Court then assigned such discharged attorney as counsel for the Petitioner, despite the objections of the Petitioner (10a, 11a, 12a, 13a).

The case then proceeded to trial before a Jury and the Petitioner was convicted and thereafter sentenced to fifteen (15) years imprisonment. Thereafter the Mandate issued and the Petitioner is presently incarcerated in the United States Penitentiary at Atlanta, Georgia.

Analysis of the Opinion of the Circuit Court of Appeals

The Circuit Court of Appeals *first* found that the Petitioner had waived his Constitutional right to counsel and had elected to proceed to trial without counsel and to conduct his own defense:

> "* * * Judge McLean could have then ordered appellant to proceed to trial without counsel after Mr. Kreiger had been dismissed." (Opin. 2791)
>
> * * * * *
>
> "Against this background, if Judge McLean had ordered appellant to proceed to trial without counsel, appellant's constitutional right to the assistance of counsel would not be violated." (Opin. 2791)

The Circuit Court of Appeals *then* utterly disregarded the impact and thrust of such determination that the Petitioner was entitled to proceed pro se and deprived him of that right by sanctioning the assignment of counsel by the District Court.

Finally the Circuit Court of Appeals attempted to justify such assignment of counsel by approving of the performance of such assigned counsel during trial.

REASONS FOR GRANTING WRIT

POINT I

The Circuit Court of Appeals erred in sanctioning the improper and unauthorized assignment of counsel.

a) In view of such initial finding that the Petitioner had waived his right to the assistance of counsel, he should have been permitted to proceed pro se.

Under such circumstances, the assignment of counsel over the objections of the Petitioner, constituted an unwarranted usurping by the Court of the Petitioner's right to select counsel of his own, free choice. The Court apparently distorted and misconstrued the waiver of assistance of counsel to be limited to a mere waiver of the right to select counsel, and thereupon sought to impose its *own* selection of counsel upon the Petitioner. It was not the Petitioner's intention to delegate his right to the selection of counsel of his own free choice to the Court, as is borne out by his strenuous objections to such assignment (12a, 13a).

> "I do not wish Mr. Krieger as my lawyer * * * This is against my will."

The sanctioning of the assignment of counsel is inconsistent with and repugnant to the prior determination that the Petitioner had waived his right to the assistance of counsel. Hence, the Petitioner was erroneously denied the right to proceed pro se by the unsolicited assignment of counsel.

b) In any event, the assignment of counsel to the Petitioner was unauthorized by Rule 44 (F.R.C.P.), inasmuch as both of the exlusionary conditions existed in the case at

bar. The Rule expressly states that the Court has no right to assign counsel if a Defendant either:

> "* * * elects to proceed without counsel, *or* is able to obtain counsel". (italics supplied)

The existence of either of these conditions is sufficient to deprive the Court of authority to assign counsel for a defendant.

In the instant case, the determination of the Circuit Court of Appeals that the Petitioner had waived his Constitutional right to the assistance of counsel is tantamount to a finding that the Petitioner elected to proceed without counsel. Moreover, the Petitioner was not a pauper and was able to afford to retain his own counsel (Opin. 2790). Hence, the District Court had no authority to assign counsel.

POINT II

The Circuit Court of Appeals erred in attempting to justify the unauthorized assignment of counsel by his performance during trial.

In view of the fact that the Court had no authority to assign counsel, the efforts and performance of such assigned counsel during trial cannot justify or legalize his unauthorized assignment. Hence, the conduct of such unauthorized assigned counsel during trial is immaterial and cannot justify the unauthorized, unconstitutional, and illegal deprivation of Petitioner's rights to either the assistance of counsel of his own free choice or to proceed pro se.

In view of the immateriality of the manner of performance during trial of such assigned counsel, Petitioner need not demonstrate any prejudice resulting therefrom; the prejudice to the Petitioner having arisen by virtue of the unauthorized assignment of counsel. As was stated in *Releford* v. *United States,* 288 F. 2d 298:

> "In our view, however, where there has been a complete disregard of the defendant's right to choose his own counsel, *prejudice will be assumed.*" (italics supplied)

Also in *Glasser* v. *United States,* 315 U.S. 60, the Court stated:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of * as counsel for * is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

In passing, it might be noted, that such attempted justification of the unauthorized assignment of counsel amounts to a complete nullification of a Defendant's right to proceed pro se; because an attorney is expected by virtue of his specialized training, to be more proficient during trial than a layman.

POINT III

The Circuit Court of Appeals erred in sanctioning the wrongful denial of Petitioner's right to the selection and assistance of counsel of his own free choice by the assignment of discharged counsel.

The District Court stripped Petitioner of any free choice in the selection of counsel. Although the Petitioner objected to the assignment of counsel (10a, 11a, 12a, 13a), the Court insisted and tried its utmost to convince him not to discharge his attorney (10a, 11a); and failing of that, the Court threatened Petitioner that unless he reconsidered and permitted his discharged attorney to act as counsel, the Court would nevertheless assign such discharged attorney to represent him.

The objection to being represented by the attorney he had just discharged, should have been respected; or, even if the Court wrongfully insisted upon the assignment of counsel, it should not have assigned the very same attorney who had just been discharged, against the objection of the Petitioner.

The Court, in *In Re: Mandell* (69 F. 2d 830), stated:

> "On the other hand, in general we regard it as inimical to good administration to fasten an attorney upon the trustee against his will."

And in *Glasser* v. *United States* (*supra*):

> "Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think such a desire on the part of the accused should be respected."

Again in *Lee* v. *United States* (235 F. 2d 219):

> "Should the Court ultimately be obliged to appoint counsel, we assume that, *however ill-founded Appellant's objection,* Mr. * (the attorney who had just been discharged) will not be reappointed." (italics and parenthesized matter supplied)

Accord:

> *Chandler* v. *Fretag,* 348 U.S. 3;
> *Walleck* v. *Hudspeth,* 128 F. 2d 343;
> *United States* v. *Bergamo,* 154 F. 2d 31.

POINT IV

The Circuit Court of Appeals erred in sanctioning the finding that the petitioner failed to justify the discharge of his retained counsel.

The Petitioner's reason for discharging his retained counsel is immaterial. Inasmuch as the right to discharge retained counsel is incidental to the right to retain such counsel, no cause for such discharge need be shown. *Lee* v. *United States* (*supra*).

So long as the Petitioner felt that there was a lack of rapport between himself and his retained counsel, *however ill-founded,* he had the sole and absolute right to discharge such retained counsel. *In re: Mandell,* (*supra*):

> "The relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously."

The reason for the lack of rapport which resulted in his discharge was the attorney's zealousness to comply with

the Court's prior direction as opposed to his own admission that he was not fully prepared for trial (8a).

> "Mr. Krieger: I was ordered by Judge MacMahon to be ready to proceed to trial this morning. I have obeyed the court's order.
> The Court: Are you ready?
> Mr. Krieger: Yes, your Honor."
>
> * * * * *
>
> "* * * I pray the court to realize that *my client knows infinitely more about the case than do I.*" (italics supplied)

Certainly, under these circumstances, the discharge of the attorney was justified.

POINT V

The Circuit Court of Appeals erred in sanctioning the disregard of the Petitioner's express statement of readiness.

After discharging his retained counsel, Petitioner stated to the Court that he was then and there ready to proceed to trial but without the services of his discharged attorney (11a).

> "I will subpoena my people today, if you want, your Honor. I will not hold this Court up any longer."
>
> * * *
>
> "There is no tactics."

The District Court overlooked, ignored and misconstrued such statement of readiness as a request for an adjournment.

If in doubt as to the meaning of Petitioner's express statement of readiness, the Court should have conducted an inquiry as to whether the Petitioner wished to proceed pro se. This was recognized by the Circuit Court of Appeals (Opin. 2793), which stated:

> "This would, of course, have been clearer if the court had followed the preferable procedure of inquiring of appellant whether he wished to continue with Mr. Krieger or, in the alternative, proceed pro se."

In the absence of such inquiry, the arbitrary disregard of the Petitioner's statement of readiness constitutes error; particularly, inasmuch as the Circuit Court of Appeals had already determined that the Petitioner waived his right to the assistance of counsel and had, in fact, elected to proceed pro se.

The unfounded and unjustified determination that the Petitioner's statement to the Court that he was then and there ready to proceed to trial, was merely an excuse for delay, is not a proper exercise of judicial discretion and cannot be justified by the record of prior culminated proceedings which had occurred in other courts and which were not properly before the trial court.

The holding of the Circuit Court of Appeals should not have been influenced by the number of prior attorneys or prior adjournments, in view of the Petitioner's unqualified statement in open court on the day of trial that he was then and there ready to proceed to trial *pro se*. Apparently, the District Court was reluctant to permit the Petitioner to proceed *pro se*, and sought to foreclose any possible claim

that Petitioner was deprived of his right of counsel. Ergo, the foisting of unwanted counsel upon Petitioner.

The Circuit Court of Appeals based its Opinion upon an inapplicable citation; to wit: *Cleveland* v. *United States* (322 F. 2d 401), which involved assigned counsel, a request for a further adjournment in order to retain new counsel and the refusal of the Court to grant a continuance for such purpose. The case at bar is clearly distinguishable in that the Petitioner had retained his own counsel; had discharged such retained counsel, as he had a right to do; such discharge occurred prior to trial; Petitioner did not request an adjournment to retain new counsel nor attempt to delay the trial; Petitioner expressly stated that he was ready to proceed to immediate trial; and Petitioner objected to being forced to accept the assignment of the attorney he had just discharged.

CONCLUSION

For all of the reasons hereinabove set forth, it is respectfully submitted that this Petition be granted and that a writ of certiorari issue.

Respectfully submitted,

IRWIN KLEIN
Attorney for Petitioner

APPENDIX A

Opinion of Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 480—September Term, 1964.

(Argued May 18, 1965 Decided July 16, 1965.)

Docket No. 29540

UNITED STATES OF AMERICA,

Appellee,

—v.—

ACHILLES ABBAMONTE,

Appellant.

Before:

WATERMAN, MARSHALL and ANDERSON,

Circuit Judges.

Appeal from a judgment of conviction for violating 21 U. S. C. §§173, 174 entered by the District Court for the Southern District of New York after a trial before a jury and Judge Edward C. McLean. Affirmed.

EDWARD M. SHAW, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, on the brief) (Michael W. Mitchell, Assistant United States Attorney, of counsel), *for Appellee.*

IRWIN KLEIN, New York, N. Y., *for Appellant.*

MARSHALL, *Circuit Judge*:

This appeal is from a judgment of conviction for violating 21 U. S. C. §§173, 174 entered after trial by jury before Judge Edward C. McLean in the United States District Court for the Southern District of New York. Trial was had on a single count indictment involving a single incident on one day. Appellant seeks a reversal on two grounds, alleged improper appointment of counsel and certain alleged errors in admissions of testimony. We will consider them in that order.

I

Appellant was indicted on June 23, 1964, and was confined to the United States House of Detention in lieu of $50,000 bail. On June 24 appellant, claiming to be without funds, was assigned an attorney by Judge Wyatt and the case was adjourned to June 29 when appellant sought a reduction of bail. That was denied and the case adjourned to July 1. On July 1 appellant entered a plea of not guilty, bail was reduced to $30,000 and the case was adjourned to July 20 for motions to be filed. On July 10, on motion by appellant's privately retained counsel, bail was further reduced to $20,000 by Judge Bryan. On July 17 Judge Murphy denied further time to file motions and assigned the case for trial on July 20. On July 21 appellant notified Judge Cannella that he had had a dispute with the lawyer retained by his family and was then without counsel. Judge Cannella offered to appoint counsel for him but appellant declined the offer requesting time to obtain counsel of his own choice. Judge Cannella reassigned the Legal Aid attorney to help him while he sought

to retain counsel of his choice, gave him an extra copy of the indictment, and carefully advised him of his right to subpoena witnesses. Appointed counsel was relieved when appellant said he would make bail and on August 4 appellant, through his retained counsel, sought a further adjournment of two weeks. Judge McMahon adjourned the trial to August 10 before Judge McLean.

On August 10, after all these adjournments, changes in counsel, and motions for the reduction of bail, which surely would weary the most patient, appellant appeared before Judge McLean with his most recently retained counsel. He then requested another adjournment on the ground that he had only been out on bail for six days and wanted to subpoena some witnesses. His attorney, however, said that he was ready to go to trial, although he admitted appellant knew more about the case than he did. At that point, the following discussion took place:

> The Court: We will go ahead this morning.
>
> The Defendant: Then, your Honor, I have to make one more request then. I wouldn't want Mr. Krieger as my lawyer. If he doesn't go along with me at my requests, I simply can't have him as my lawyer.
>
> The Court: Well, you have had three lawyers now, Mr. Abbamonte, and there has to come a time when changing lawyers stops. Now, Mr. Krieger has been all over this with you. You retained him yourself.
>
> The Defendant: I didn't retain him, sir. I didn't retain him. My family retained him.
>
> The Court: Well, I think you should be content to have Mr. Krieger represent you.
>
> The Defendant: He might be a competent lawyer and the best lawyer around but I can't have any faith if the man doesn't go along with me.

Mr. Gold: If your Honor please, I think what the defendant is asking for is that the lawyer go along with his own misstatements which Mr. Krieger is not willing to do.

The Defendant: There is no misstatements.

Mr. Krieger: Your Honor, unless this be terminated forthwith, may this be conduct[ed] in the robing room?

The Defendant: This is a new application of which I had no forethought.

The Court: I don't think there is much more to conduct. How do you feel about the latest remark?

Mr. Krieger: The only application is obviously if my client says he doesn't want me, I want to join in an application to be relieved. If he doesn't want me, I don't want him.

Mr. Gold: Your Honor, this case has gone on this long and this is obviously another tactic to try and delay it and try to put off the trial.

The Defendant: There is no tactics. I will subpoena my people today, if you want, your Honor, I will not hold this court up any longer. I am just looking for a fair trial, your Honor.

The Court: You will get a fair trial, Mr. Abbamonte, and I think in your interest Mr. Krieger should continue to represent you. He is an experienced lawyer, and he's been over this case with you and he knows what defense to put in.

The Defendant: We haven't gone over the case, your Honor.

The Court: You have had two other lawyers before Mr. Krieger, and I don't feel that I should just put everything off for you to try to find another one. If you can't make an arrangement with Mr. Krieger that is satisfactory to both of you then I will have to assign Mr. Krieger to represent you but I'm going to go ahead with this today.

Mr. Krieger: Well, I call the question, your Honor, I ask for a ruling on my motion to be relieved because of dissatisfaction of the defendant.

The Court: I don't feel, Mr. Krieger, that there is any real dissatisfaction. I feel that this is an effort on the part of the defendant to secure further delay.

Now, I have confidence in you and I know you are a good lawyer and you handle these things well, and I hope that you and the defendant will dispose of whatever difficulties you have which apparently haven't existed until this minute, but I will assign you anyway and ask you to go ahead with it.

Mr. Krieger: Then it is your Honor's ruling that—will I be correct in stating—you grant my application to be relieved as retained counsel and you assign me as assigned counsel to represent this defendant?

The Court: If necessary I will do that but I hope that in a few minutes' time you and your client can dispose of your difficulties and there won't be any need to relieve you. So we will hold the application in abeyance, if you like, but if you do feel that you have to renew it, I'm going to deny it and I will relieve you from private counsel and assign you as assigned counsel, if you have to.

Mr. Krieger: May I have your Honor's indulgence for about a moment?

The Court: Go ahead.

(Discussion off the record.)

Mr. Krieger: Do you wish to say anything to the court?

The Defendant: I don't wish Mr. Krieger as my lawyer.

Mr. Krieger: I think on that basis, your Honor must make a ruling, most respectfully.

The Court: Very well. I will relieve you in that

sense, if you like, but I'm going to assign you to represent this defendant and we are going to go ahead with the trial because we can't be perpetually changing lawyers.

Mr. Krieger: Then my being relieved is without restriction, it is an unconditional release and a consequent and almost simultaneous assignment.

The Court: Put it that way if you like.

Mr. Krieger: Very well, your Honor. I have been assigned to represent you.

The Defendant: This is against my will.

The Court: I'm sorry, but there comes a time when you have to put an end to this.

The Defendant: Your Honor, I've only been out on bond since last Tuesday. They had me incarcerated for nine weeks. I have a family outside. I have a boy going to high school. I had to make a lot of preparations for my family to get prepared here.

The Court: All right. That's all.

Mr. Krieger: Thank you, your Honor.

Appellant was not a pauper. Instead his complaint is that he was not permitted to have the "assistance of counsel of his own choice" or to proceed without counsel and that this was in violation of Rule 44, Federal Rules of Criminal Procedure[1] and of the Sixth Amendment. Under the circumstances of this case, and in light of the earlier proceedings, we cannot agree.

The record of this case reveals a series of endless delays and maneuvers that could only have a dilatory purpose.

---

[1] "Assignment of Counsel. If the Defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

Considering all the previous opportunities appellant had to retain counsel, the warnings and advice of the district judges concerning the inevitability of trial and the importance of retaining counsel, and the previous changes in counsel, Judge McLean could have then ordered appellant to proceed to trial without counsel after Mr. Krieger had been dismissed.

> "... [W]here a defendant able to retain counsel has been advised by the court that he must retain counsel by a certain reasonable time, and where there is no showing why he has not retained counsel within that time, the court may treat his failure to provide for his own defense as a waiver of his right to counsel and require such defendant to proceed to trial without an attorney." *United States* v. *Arlen*, 252 F. 2d 491, 494 (2 Cir. 1958).

The right to counsel "cannot be ... manipulated so as ... to interfere with the fair administration of justice." *United States* v. *Bentvena*, 319 F. 2d 916, 936 (2 Cir.), *cert. denied*, 375 U. S. 940 (1963). Against this background, if Judge McLean had ordered appellant to proceed to trial without counsel, appellant's constitutional right to the assistance of counsel would not be violated. As the Circuit Court for the District of Columbia recently declared:

> "Counsel urges that when the constitutional right is pitted against the inconvenience of delay a substantial presumption must be indulged in favor of the former. This is true, but in the case at bar Cleveland is not asserting a bare right to counsel or to choose his own counsel. He is asserting a right to a *third* choice. He had first chosen to have the court appoint counsel for

him; this was done. He then chose to have a lawyer from the Intern program; this was granted. Then on the day of the trial he advanced a third choice, i.e., retained counsel. The problem here is not the right to counsel or the right to counsel of the defendant's choice. It is whether another continuance was required to allow the defendant to exercise the right to a third choice. We think that, under the circumstances of this case, the assignment judge could reasonably have concluded that it was not." *Cleveland* v. *United States,* 322 F. 2d 401, 402-403 (D. C. Cir.), *cert. denied,* 375 U. S. 884 (1963).

Accord: *Leino* v. *United States,* 338 F. 2d 154 (10 Cir. 1964); *Neufield* v. *United States,* 118 F. 2d 375 (D. C. Cir. 1941), *cert. denied,* 315 U. S. 798 (1942).

Since Judge McLean could have ordered appellant to trial without counsel, and thus could have deprived appellant of the opportunity of choosing and retaining another counsel, the remaining question is whether it was improper to deprive appellant of the opportunity to conduct his own defense by appointing Mr. Krieger as his counsel. See generally *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 279 (1942), *rehearing denied,* 317 U. S. 605 (1943); *Price* v. *Johnston,* 334 U. S. 266, 285 (1948); Annot., 77 A. L. R. 2d 1233 (1961). We hold that in the circumstances of this case Judge McLean did not commit reversible error in assigning Mr. Krieger. Appellant's sole reason for discharging Mr. Krieger was his refusal to make the request for a further postponement to which the appellant was clearly not entitled. He gave no indication that he wished to defend himself. Rather, Judge McLean could

have reasonably inferred that appellant sought nothing more than a repetition of his maneuvers for delay, which was his real objective, by the tactic of firing still another lawyer, and that appellant had no intention of conducting his own defense because of any substantial dissatisfaction with his attorney. This would, of course, have been clearer if the court had followed the preferable procedure of inquiring of appellant whether he wished to continue with Mr. Krieger or, in the alternative, proceed *pro se*. But any reluctance we might have about resting our holding on inferences is dispelled by the conclusion that the appointment of Mr. Kreiger helped rather than harmed Abbamonte. Mr. Krieger is an able and experienced criminal lawyer. He had conferred with the accused[2] and was familiar with the case, which was not unduly involved. And, after carefully reviewing the entire transcript of the trial, we can confidently state that, from beginning to end, Mr. Krieger conducted a most vigorous defense. During the entire trial appellant did not object to Mr. Krieger's strategy or questioning, and even at this late stage, appellant is unable to point to any dereliction of duty on Mr. Krieger's part.

II

Appellant's claim of reversible error in the admission of testimony of government's rebuttal witness is without merit. A defense witness, Heywood Williams, testified that he had been dragged down to Narcotics headquarters without a warrant and "charged with obstructing justice" because

---

[2] Appellant concedes that his statement to Judge McLean to the contrary, see *supra* p. 2788, was inaccurate.

he had revealed an agent's identity. The government called its agent who testified:

> "During the course of early April 1964, I had been receiving reports from various agents in the office that Heywood Williams an informant under my control was pointing out Agent Coursey to narcotic violators in the Harlem, New York areas was [sic] a federal agent; and was consequently jeopardizing Agent Coursey's status."

This testimony was admissible to explain the reason Williams was brought to headquarters. It was not reversible error, *Busby* v. *United States*, 296 F. 2d 328 (9 Cir. 1961), *cert. denied*, 369 U. S. 876 (1962).

Likewise, the testimony of another agent concerning a conversation between appellant and his partner relating to another transaction was clearly admissible on the issue of appellant's knowledge and willingness to deal in narcotics, *United States* v. *Massiah*, 307 F. 2d 62 (2 Cir. 1962), *rev'd on other grounds*, 377 U. S. 201 (1964).

The judgment is affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of July, one thousand nine hundred and sixty-five.

Present:

HON. THURGOOD MARSHALL
HON. STANLEY R. WATERMAN
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

ACHILLES ABBAMONTE,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

APPENDIX C

Decision on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ACHILLES ABBAMONTE,

Defendant-Appellant.

PETITION FOR REHEARING

Irwin Klein, New York, N. Y.,
for defendant-appellant.

Petition denied.

S. R. W.
R. P. A.
U. S. C. JJ.

Sep 15 1965

Decision on Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ACHILLES ABBAMONTE,

Defendant-Appellant.

PETITION FOR REHEARING IN BANC

Irwin Klein, New York, N. Y.,
for defendant-appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

/s/ STERRY R. WATERMAN
Sterry R. Waterman
Acting Chief Judge

Sep 15 1965

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 740

ACHILLES ABBAMONTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13–22) is reported at 348 F. 2d 700.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1965 (Pet. App. 23; R. 82a). Petitions for rehearing and for rehearing *en banc* were denied on September 15, 1965 (Pet. App. 24, 25; R. 86a–92a, 96a). On October 12, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including November 13, 1965, and the

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petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after petitioner had caused repeated delays of his trial by changing attorneys, the trial court properly exercised its discretion in assigning as defense counsel petitioner's retained attorney, whom he had just discharged.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on a one-count indictment charging a narcotics sale in violation of 21 U.S.C. 173 and 174 (R. 3a, 5a). He was sentenced as a third offender to imprisonment for 15 years (R. 3a–4a, 62a–63a, 66a, 68a–69a). On appeal, the conviction was affirmed (R. 4a, 70a–71a, 82a). The pertinent facts may be summarized as follows:

Petitioner was indicted on June 23, 1964 (R. 1a), and on the following day an attorney from the Legal Aid Society was assigned to represent him (R. 1a). On July 1, petitioner entered a plea of not guilty, bail was reduced to $30,000, and the case was adjourned to July 20 to permit the filing of motions (R. 1a). Petitioner then retained new counsel, on whose motion bail was reduced on July 10 to $20,000 (R. 2a). On July 21, that attorney (with whom petitioner had had a dispute (Pet. App. 14)) was relieved as petitioner's counsel, and the trial was adjourned until July 27 (R. 2a). The Legal Aid attorney was

reassigned to the case (Pet. App. 14–15), but was relieved on July 30 since petitioner had retained another attorney, Mr. Krieger, who filed a notice of appearance on August 5 (R. 2a).

The case was finally called for trial on August 10, 1964, at a time when petitioner was out of prison on bail (R. 6a, 66a). Petitioner requested another adjournment for the purpose of subpoenaing witnesses (R. 7a). When asked whether he needed additional time, attorney Krieger answered, "I personally don't. I am however deferential of my client's wishes and I wish the court to consider them. I pray the court to realize that my client knows infinitely more about the case than do I" (R. 8a). Noting that the indictment had been pending for about six weeks, that petitioner had been represented during this period by three different attorneys, and that petitioner could subpoena any witness to appear at a later date during the trial, the court denied the application for adjournment (R. 8a–9a). Petitioner then stated that Mr. Krieger could not be prepared to go to trial since he had not even talked about the case; Mr. Krieger stated that the two had had an extensive conversation and conference (R. 10a); and there ensued the colloquy (R. 10a–13a), set forth in the opinion below (Pet. App. 15–18), in which petitioner stated that he wanted a new attorney and the trial judge, over petitioner's protest, directed that Mr. Krieger remain as defense counsel and that the trial proceed.

ARGUMENT

This case presents no issue of general importance. The only question involves the application of well settled principles to the particular circumstances—in the light of which, we submit, the decision below is clearly correct. The right of an accused to select his own counsel cannot be "insisted upon or manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." *United States* v. *Bentvena*, 319 F. 2d 916, 936 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States*, 375 U.S. 940. In view of petitioner's obdurate delaying tactics, the trial court properly exercised its discretion in assigning Mr. Krieger as defense counsel so as to forestall further unjustified delays. Cf. *Leino* v. *United States*, 338 F. 2d 154, 156 (C.A. 10); *Cleveland* v. *United States*, 322 F. 2d 401 (C.A.D.C.), certiorari denied, 375 U.S. 884.

Petitioner argues that rather than assign Mr. Krieger the court should have allowed petitioner to proceed *pro se*. But he gave no indication that he wanted so to proceed. What he really wanted was a further postponement of the trial date. And since petitioner's dismissal of Mr. Krieger was manifestly a mere delaying tactic, rather than an expression of *bona fide* dissatisfaction with his services, the court acted properly in directing Mr. Krieger to remain as assigned counsel. He was counsel of petitioner's choice and he was prepared to try the case. Mr. Krieger's statements showed that he and petitioner had held a conference regarding the case and that he

was ready for trial (R. 8a, 10a); his remark that "my client knows infinitely more about the case than do I" (R. 8a) was not an admission of unpreparedness but merely an argument in support of his client's request for a continuance.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1965.

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*The Solicitor General having disqualified himself.